

BOSTON PUBLIC LIBRARY



3 9999 06660 787 8



6351. 2





*City Document.—No. 10.*

---

ADDRESS  
OF  
HIS HONOR JOHN S. SLEEPER,  
MAYOR OF ROXBURY,  
TO THE  
CITY COUNCIL OF ROXBURY,  
AUGUST 30, 1858,  
ANNOUNCING THE RESULT OF THE SUIT,  
COMMONWEALTH vs. ROXBURY AND WEST ROXBURY,  
RELATING TO THE  
BACK BAY LANDS.

---



---

ROXBURY:  
L. B. & O. E. WESTON, PRINTERS, GUILD ROW.  
1858.

## CITY OF ROXBURY.

---

IN BOARD OF ALDERMEN, Aug. 30, 1858.

ORDERED, That the Address of His Honor the Mayor, relative to the Back Bay Lands, be laid on the table, and printed for the use of the City Council.

JOSEPH W. TUCKER, *City Clerk.*

## City of Roxbury.

---

IN BOARD OF ALDERMEN, August 30, 1858.

*To the Board of Aldermen and Common Council of  
Roxbury:*

GENTLEMEN, —

THE legal controversy between the Commonwealth, on the one side, and the City of Roxbury and town of West Roxbury, on the other, in relation to the Back Bay Lands, having been terminated by a decision of the Supreme Court, and the costs having been adjudicated and the expenses ascertained, it may be proper for me at this time to lay before the City Government a brief outline of the circumstances attending the progress of the suit, and the grounds on which were based the judgment of the Court.

It has been believed for many years that all the land within the boundary lines and jurisdiction of Roxbury, not belonging to or claimed by individuals or incorporated companies, including, of course, the flats in the empty basin, actually belonged to Roxbury. The Colonial Grant of May, 1636, defining the bounds of Roxbury, and conveying the right and title to the *soil*, from the highest authority on these shores, reads as follows:

“ Ordered that all the rest of the ground, lying betwixt Dorchester bounds and Boston bounds, shall belong to the town of Roxbury, easterly of Charles River, Roxbury not to extend above eight miles in length from their meeting house.”



The boundary lines were established according to the description in the above grant — and in 1823, when the Milldam or Western Avenue was constructed, the lines were again run, as originally established; and in 1836, an act of the Legislature confirmed to the City of Roxbury not only the jurisdiction over the territory between those lines, but the "*territory*" itself. Furthermore, Roxbury has always claimed and held these lands — has mowed the grass on the flats for more than twenty years, and exercised all the customary rights of possession.

This claim, within comparatively a few years, has been disputed by the Commonwealth, and at the October term of the Supreme Judicial Court, in 1856, suits were instituted by the Commonwealth and the Boston Water Power Company to dispossess the City of Roxbury and town of West Roxbury of a tract of land and flats in the Back Bay, amounting to about seventy-two acres.

The time appointed for the trial of the suit instituted by the Commonwealth approached, and the expenses of a suit, extremely complicated, unusually difficult to investigate, and involving nice questions of law, being an important consideration, it was thought advisable to employ able counsel to examine the merits of the case, with a view to defend it with vigor, if it was worth defending, or to abandon it, provided the claims of Roxbury could not in all likelihood be enforced.

An opinion was expressed, after mature deliberation, that the case was a good case; that Roxbury was entitled to the fee of the territory in dispute, and that, beyond all reasonable doubt, her claims could be established in a Court of Law. It was then determined, after consultation with the government of West Roxbury, that no labor or expense should be spared to defend claims, believed to be founded on justice, and which were so essential to the interest of our city, even against the whole power of the



Commonwealth and the influence of a colossal monied Corporation.

Owing to the peculiarly intricate character of the case, and the difficulty, I may say impossibility, of explaining to a jury the complicated evidence and legal principles involved, within the time usually allowed, it was agreed by both parties to waive trial by jury, and submit the case to a single referee. The Hon. Marcus Morton was selected as that referee, and he accepted the appointment.

This gentleman had for many years held the office of one of the Justices of the Supreme Court of Massachusetts, and had acquired and always maintained a proud reputation, not only as a jurist, but as a high-minded, honest, independent man. On his decision, after a full hearing, and patient investigation of facts, the defendants were willing to abide.

In the agreement to refer, the following language, defining the duties of the referee, was used :

“ And the referee may make all needful views of the premises, and all reasonable orders for the proper hearing and determination of the cause, and the referee shall report all questions of law arising in the cause to the Court for revision and final adjudication : meaning hereby, that the referee shall award and determine the whole cause, including the law and the facts, but subject to the review and final adjudication of all matters of *law* in the cause by the full Court.”

The hearing was had during the Summer of 1857, and occupied many days. The cause was managed, on the part of the State, by Sidney Bartlett and T. B. Hall; for the City of Roxbury, by Richard Fletcher, Joel Giles, and William Gaston, the City Solicitor. To the ability and unremitting attention of these gentlemen to the case, from the commencement to its close, I can bear strong testimony. The City Solicitor has spent much time, and has been unsparing in his efforts to cause a full investigation to be made in this case — and if the result of the suit has not been attended with success, it is not owing to any want of

zeal, talent, or industry on his part, or on the part of other counsel engaged.

The result of the *reference* was such as was confidently anticipated from the character of the facts, and the arguments employed in behalf of Roxbury. The Referee, in his report, speaking of the Colonial Order or Grant of May 25, 1636, already alluded to, says:

“I am therefore of opinion and decide that this order was a grant in fee of all the land described in it: that the description covers all the land lying between Dorchester and Boston, as the limits of the two towns then existed, which had not before been granted to Roxbury. That inasmuch as every part of the territory granted lay easterly of some parts of Charles River, and southerly of some parts of said river, I cannot believe that the introduction of the words, ‘easterly of Charles River,’ if they apply to the granted new territory rather than the whole town, was intended to divide it, and to grant one part and reserve the other part of the territory, which was included in the general description of the whole. I am, therefore, of opinion, and do decide, that the Act of 1636, in the liberal and proper construction of the language used, operated as a grant, and vested in the then town of Roxbury the fee of the demanded premises.”

In concluding his report, the Referee says:

“Having duly considered the whole case, and all the several grounds taken and urged by the counsel on both sides, and given my opinion on the same as before stated, I do now report and decide and award that the Defendants have established their title to the fee of the demanded premises as described in the Attorney General’s Information, and therefore, that the Commonwealth take nothing by their Information aforesaid, and the costs be taxed according to law.”

The Referee thus decides that the Colonial Grant of 1636 was a grant of land — and indeed this was admitted by the Counsel for the Commonwealth. The question then arises in relation to the *fact*, where were the boundaries of this Colonial grant? It was shown by indisputable evidence that the tract of land claimed by the State was within the boundaries of that grant, and therefore belonged to Roxbury. Such was the decision and reasoning of the Referee.

But this award, expressed in language so clear and conclusive, was not a final settlement of the case. It was necessary for its validity, to receive the sanction of the Justices of the Supreme Court. And with what was believed to be a strong case, with such a decision in favor of Roxbury, after a laborious investigation, and on a question of *fact* and not of law, our citizens were justified in believing that this long-contested question would be finally settled in favor of our City.

The case came before the whole bench of the Supreme Court, at the sessions in March last. Mr. Fletcher appeared for Roxbury. No point of law being mooted, there was no room for an argument. He contended, however, that the Referee having decided as matter of law, that the act of 1636 was a grant in fee of all the land described in it; and the Referee having also found by the evidence and view, and decided, as *matter of fact*, that the demanded premises were embraced within the descriptive bounds of that grant, the award was *decisive of the case, and conclusive upon the parties under the submission*.

The opinion of the Court was delivered by the Chief Justice, on the 21st of June last, by which it appeared that the decision of Marcus Morton, — that the lands in question, in virtue of the original grant, belonged to Roxbury, — was *reversed*, and the case was thus decided by the highest judicial authority, in favor of the Commonwealth!

The opinion of the Court, setting forth the reasons for this unexpected decision, was drawn up and delivered by the Chief Justice. It was a learned and elaborate document, occupying nearly two and a half hours in the reading. • The Chief Justice described the matter in controversy as follows:

“The Commonwealth claim to hold and own, as proprietors in fee, the soil of that portion of the Back Bay, within the empty basin, which before the tide-water was excluded from said Bay by the erection of the Mill Dam or Western Avenue, was within the ordinary ebb and flow of



the tide, and which lay below, that is, so far distant from the uplands, as to be below the line of riparian proprietorship."

The Court, in putting a legal construction upon the grant of 1636, already alluded to, were unable to concur in the conclusion to which the arbitrator came. They say:

"We are of opinion that it [the Colony grant] did not pass to the grantees, any right, title or interest in the *soil* of the flats of Charles river, or the Back Bay, below the line of ordinary high water mark: and of course they could *acquire* no title to flats lying more than one hundred rods sea-ward below such high water line."

In support of this opinion, they decide that by the common law of England, as it stood long before the settlement of this country, the title to flats was in the king, that it was held by him "in trust for public uses," that

"The king held the sea-shores as well as the land under the sea, that he held the same, *publici juris*, for the use and benefit of all the subjects for all useful purposes, the principal of which were navigation and the fisheries."

Also that

"A grant of lands lying on the sea-shore, or an arm of the sea, where no such law as the Colony Ordinance of Massachusetts of 1641 has been adopted, will not convey land beyond high water mark, unless the intention to grant a right in flats is expressly stated."

And further —

"Even if the colonial act in question had been passed after the ordinance of 1641, extending a qualified right of the soil of riparian owners, to the extent of an hundred rods, and the grant had been *bounded on the sea*, it could have carried the right of the grantee to one hundred rods *only* below the ordinary high water line, and *would not have included the flats in question, which are beyond one hundred rods.*"

The Court, in this important legal "Opinion," thus summarily disposes of a "great mass of evidence, which made part of the case:"

"All the early acts fixing boundaries between towns, all the perambulations of lines made by selectmen, and recorded in town books, have

no tendency to prove or disprove title : they affect the question of jurisdiction only : and for the purposes of the present enquiry may be laid out of the case."

The Chief Justice concludes the opinion as follows :

" He [the referee] reports that in his opinion the title to the flats in question is in the Commonwealth, unless it has been alienated by the government, or one of its predecessors. No such act of alienation or grant is relied on, or given in evidence, except the Colony ordinance of May, 1636. The referee was of opinion that this act *did* operate as an alienation in favor of the respondents. But we are of opinion, that *upon the facts shown and referred to in the report, the construction of this ordinance was a question of law*, and upon that question, this Court are of opinion that that act did *not* affect such alienation, and therefore that the title still remains in the Commonwealth ; — concurring in all other respects with the referee."

The judgment of the Court is rendered as follows :

" Report of the Referee had and accepted, subject to the opinion of the whole Court in matters of law ; the Court are of opinion in point of law, that the grant from the Colonial government, to the town of Roxbury, in May, 1636, did not include any land bordering on the sea or tide-waters, *below ordinary high-water mark*, and therefore that judgment for their title to and possession of the demanded premises be entered for the Commonwealth. Judgment for the Commonwealth."

This opinion delivered by the Chief Justice, and embracing views so unfavorable to Roxbury, so contrary to the decision of the Referee, and so directly antagonistic to the views which the inhabitants of Roxbury had for years been led to consider not only righteous, but legal, also, caused much surprise as well as disappointment among our citizens. And indeed by some unsophisticated persons, who had watched the proceedings with interest, and were not aware of the different phases, altogether unlike, which legal questions can be made suddenly to assume, it was thought somewhat remarkable that while the counsel for the Commonwealth admitted that the grant of 1636 was a grant of land, of *soil* — the Court should decide that the metes and bounds of that grant, settled merely the question of *jurisdiction* — and also that the Court

should receive and thus virtually *accept* the award of the Referee, which was based entirely on *fact*, and *set it aside* on a point of *law*, which was not alluded to by the Referee!

The recording of this judgment was deferred for a few days at the request of the counsel for Roxbury, to allow time to show why judgment should not be entered for the Commonwealth. At an appointed time the counsel for Roxbury appeared before Chief Justice Shaw, and justices Metcalf and Bigelow, and urged various reasons why judgment should not be entered, among which was the following:

The Referee was authorized *to decide on all questions of fact* — while questions of law were to be reserved for the decision of the Court. Now the Referee had decided in favor of the claim of Roxbury to the lands in question, entirely on *facts* clearly proven, so that no opportunity was given for the Court to controvert, or entertain any questions of law. The Referee had decided that the *soil* and jurisdiction, within certain metes and bounds, and such as Roxbury claimed, belonged rightfully to Roxbury. By setting aside this award, the Court would determine not a question of law, which it was within their province to do, but a question of *fact*, which by the terms of arbitration should be left with the Referee.

The Court took time to consider the reasons thus urged; but on the third of July, finding no sufficient cause to vary their proceedings, caused judgment to be entered for the Commonwealth.

This protracted and expensive legal controversy is thus, in all likelihood, settled. The mode of its settlement furnishes another to the long list of cases, illustrating the proverbial uncertainty of the law.



But while it would have been gratifying to have had the claim of Roxbury to this piece of land, valuable from its location, confirmed by the Supreme Court, it is a source of consolation to know that, believing our claim to have been founded on justice, no proper means have been left untried to retain possession of those lands: and although we felt confident that our right and title to the fee in those lands could be maintained in a Court of Law, *our City Government has never based any public actions or expensive improvements on that expectation.* And if this result will serve to place in a stronger light than before, that the whole resources of our Government *are in the taxation of the property of our citizens*, and thus induce the adoption of a careful and economical system of expenditures, it will not be altogether without benefit.

It has been decided that the fee of the disputed lands in the Back Bay is in the Commonwealth. But it cannot be disputed that *the jurisdiction over these lands and flats is in the City of Roxbury.* An effort was made during the legislative session of 1857 to change the jurisdiction, by annexing to Boston all the lands and flats lying between Boston, on one side, and Brookline, on the other, and northerly of a line extending westerly from the junction of Cabot with Tremont Streets, and embracing about one thousand acres, or nearly one-third part of the whole territory of Roxbury!

A project, however, so manifestly unjust and arbitrary, was defeated. And should the attempt be renewed during the next session of the Legislature, so as to take from Roxbury the jurisdiction as well as the territory of the Back Bay, we have too much confidence in the uprightness, independence, and sense of justice of our legislators, to believe that this iniquitous project, notwithstanding the magic influence of wealth and power, can ever be carried into effect.

Accompanying this Report, is an Order for the payment of expenses incurred in defending the suit against the State.

I have the honor to be, Gentlemen,

Very respectfully, Your most obedt. servt.,

JOHN S. SLEEPER, *Mayor.*















